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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB-31 (Sub-No. 30)]

Grand Trunk Western Railroad Incorporated--Adverse Discontinuance of Trackage Rights
Application--A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton
County, OH

On January 23, 1998, the Norfolk and Western Railway Company (NW) filed an application under 49 U.S.C. 10903 requesting that the Surface Transportation Board (Board) order the discontinuance, or find that the public convenience and necessity require and permit the discontinuance, of the limited overhead trackage rights asserted to be held by Grand Trunk Western Railroad Incorporated (GTW) over the entire Riverfront Running Track, which is described in the agreement granting those rights, as "that portion of the line of NW through Cincinnati, OH, from the first switch west of Oasis Block Station to a connection with the Southern Railway in the vicinity of Front and Smith Streets . . . a distance of 1.6 miles," in Cincinnati, Hamilton County, OH.¹ The line is about 1.6 miles and no more than 2.2 miles in

¹ GTW acquired its interest in the agreement through the automatic assignment to GTW, as successor to the Detroit, Toledo and Ironton Railroad Company. See Norfolk & W. Ry. Co.--Control--Detroit, T. & I. R. Co., 360 I.C.C. 498 (1979) and 363 I.C.C. 122 (1980).

length. The line has no stations, and traverses United States Postal Service ZIP Codes 45202 and 45203.²

NW states that the line is out of service, but that GTW declines to file or concur in a notice of exemption because it claims to have assigned its trackage right to Indiana & Ohio Railway Company (IORY).³ Applicant has asked the Board to expedite handling of the matter due to the fact that the line is out of service and due to NW's stated intent to transfer its interest in the line to the City of Cincinnati for public purposes.

NW has petitioned the Board to waive the informational or procedural requirements of discontinuance applications that do not apply to a notice of exemption. The waiver requests as to information will be granted in a separate decision to be served concurrently with this notice. The request for modification of the schedule for filing comments will be denied. NW also requests exemption from the provisions of 49 U.S.C. 10904 and 10905. Those exemption requests will be considered by the Board in the final decision on the merits of the application.

GTW filed a petition to reject the application. The petitioner argues that the application should be rejected as prematurely filed. GTW asserts that it has assigned the trackage rights to

² Concurrent filings were made in: STB Docket No. AB-290 (Sub-No. 184X), Norfolk and Western Railway Company--Abandonment Exemption--In Cincinnati, Hamilton County, OH; STB Docket No AB-532X, The Cincinnati Terminal Railway Company (Indiana & Ohio Railway Company, Successor)--Discontinuance of Service Exemption--In Cincinnati, Hamilton County, OH; and STB Docket No. AB-167 (Sub-No. 1180X), Consolidated Rail Corporation--Discontinuance of Trackage Rights Exemption--in Cincinnati, Hamilton County, OH.

³ Because the real party of interest here is in question, both GTW and IORY are requested to participate in this proceeding.

IORY. The petition to reject argues that a grant of this application would amount to an adjudication of the dispute between NW and GTW over whether it lawfully assigned the rights to IORY. GTW cites the trackage rights agreement, which provides for the resolution of disputes arising under the agreement by arbitration. The petitioner states that it has invoked arbitration .

In further support of its argument that the application is premature, GTW says that the application should not have been filed until the various petitions for waiver filed by NW had been acted upon. Finally, GTW argues that the NW application is defective.

The Board will address the relevance of and, if appropriate, the merits of GTW's and NW's arguments as to the assignment of the trackage rights in the decision on the application. In an application by a third party for a determination that the public convenience and necessity permits a line to be discontinued or abandoned, the issue before the Board is whether the public interest requires that the line in question be retained as part of the national rail system. The question of the ownership of the line is relevant chiefly as it pertains to the question of whether the public is better served by the maintenance or discontinuance of the rights and the service they afford.

By granting a third party application, the Board withdraws its primary jurisdiction over the line. Questions of the disposition of the line, including the adjudication of various claims of ownership or other rights and obligations, are then left to state or local authorities; Kansas City Pub. Ser. Frgt. Operation- Exempt.- Aban., 7 I.C.C.2d 216 (1990). It should be noted that, whenever the Board or its predecessor, the Interstate Commerce Commission, has granted

abandonment or discontinuance authority, whether by application of a third party or otherwise, the agency finds that the public convenience and necessity supports the abandonment or discontinuance of a specific line by a specified carrier.

The parties may address this issue further in their comments and the replies thereto. GTW correctly notes that requests for waivers are typically filed before the application drawn in reliance on those waivers is filed. But in filing its application contemporaneously with the waivers, NW has merely run the risk that the waivers will be denied in whole or part and it will have wasted time and effort in filing an application based on them. Grants of petitions for waiver of the filing of the materials required in typical abandonment applications in applications filed by third parties are customary. The regulations require information intended to help the Board decide whether a particular line or service is losing money. That is typically not the issue in third party applications. It is not the issue here, where no service has been provided in recent years. We have denied NW's requests to shorten the procedural schedule or to "waive" the statutorily mandated OFA procedures.

The procedure NW chose in filing its waiver requests is no reason to reject its application. Nor is GTW's catchall assertion that the application is defective.

The line does not contain federally granted rights-of way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The applicant's entire case in chief for abandonment and discontinuance of service was filed with the application.

The interest of railroad employees will be protected by the conditions in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

The line has not appeared on the system diagram maps (SDM) or been included in the narrative in category 1. The Interstate Commerce Commission (ICC) has found that the SDM requirement, while imposed by statute, is not necessary in the context of an adverse abandonment, where the line has been out of service for many years. See Tri-County Metropolitan Transportation District of Oregon--Abandonment--A line of Burlington Northern Railroad Company in Washington County, OR, ICC Docket No. AB-6 (Sub-No. 348) (ICC served Mar. 4, 1993).

Any interested person may file with the Board written comments concerning the proposed adverse discontinuance or protests (including the protestant's entire opposition case), by March 10, 1998. Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use requests are not appropriate. Such requests will be considered in the abandonment proceeding referenced in footnote 2. Likewise, no environmental or historical documents are required here under 49 CFR 1105.6(c)(6).

Persons opposing the proposed adverse discontinuance who wish to participate actively and fully in the process should file a protest by March 10, 1998. Persons who may oppose the discontinuance but who do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments by March 10, 1998. Parties seeking information concerning the filing of protests should refer to section 1152.25. The due date for applicant's reply is March 25, 1998.

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All filings in response to this notice must refer to STB Docket No. AB-31 (Sub-No. 30) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001; and (2) James R. Paschall, Norfolk and Western Railway Company, Three Commercial Place, Norfolk, VA 23510-2191; Robert P. vom Eigen, Hopkins & Sutter, 888 16th Street, N.W., Washington, DC 10006; Mr. S. A. Cantin, Q.C., System General Counsel, Canadian National, 935 de La Gauchetiere St. West, Montreal, QC H3B 2M9; and Karl Morrell, Ball Janik, LLP, 1455 F Street, N.W., Washington, DC 20004. The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the adverse discontinuance proceeding. 49 CFR 1104.12(a).

Persons seeking further information concerning the abandonment/discontinuance procedures may contact the Board's Office of Public Services at (202) 565-1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152.

A copy of the application will be available for public inspection at NW's agency station at 1400 Gest Street, Cincinnati, OH 45203 [(513) 977-3284]. The carrier shall furnish a copy of the application to any interested person proposing to file a protest or comment, upon request.

Decided: February 6, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary